Jurisdictional Statement

81-1104

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In The

Supreme Court of the United States

October Term, 1981

S. H. GOSS, INC. and CENTRAL CHEMICAL CORPORATION,

Appellants,

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Appellee.

On Appeal from the Commonwealth Court of Pennsylvania

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Did the Pennsylvania courts err in upholding the constitutionality of a statutory scheme of regulation that permits imposition of a substantial monetary penalty against a fertilizer manufacturer even when its product meets all of the requirements of the scheme as embodied in the Pennsylvania Fertilizer, Soil Conditioner and Plant Growth Substance Law, 3 P.S. §§68.1-68.19, and the regulations adopted pursuant to that law, 7 Pa. Code §§73.1-73.11?*

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* All parties to the proceedings in the Pennsylvania state courts are parties herein and are named in the caption hereto.

DESIGNATION OF CORPORATE RELATIONSHIPS

S. H. Goss, Inc. and Central Chemical Corporation, filing this jurisdictional statement-state civil case, as appellants in this proceeding hereby state that:

This is their original designation of corporate relationships.

S. H. Goss, Inc. is not owned by any parent corporation. Central Chemical Corporation is *not* owned by any parent corporation.

S. H. Goss, Inc. does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries). Central Chemical Corporation does not have an ownership interest in any subsidiaries (excepting only wholly-owned subsidiaries).

S. H. Goss, Inc. does not have any affiliates. Central Chemical Corporation does not have any affiliates.

Dated: December 1, 1981.

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No.

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Appellee.

On Appeal from the Commonwealth Court of Pennsylvania

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the Pennsylvania Supreme Court entered September 14, 1981 denying petitioners' petition for allowance of appeal and the orders of the Commonwealth Court of Pennsylvania of May 27, 1981, April 30, 1981, and April 15, 1981 are set out in the appendix hereto. The opinion of the

Commonwealth Court of Pennsylvania dated April 15, 1981 is also set out in full in the appendix hereto and is reported as *S. H. Goss, Inc. v. Commonwealth of Pennsylvania, Department of Agriculture,* ____ Pa. Cmwlth. ____, 428 A. 2d 731 (1981).

JURISDICTION

This action to contest the imposition of civil penalties against manufacturers of dry-blend fertilizer calls into question the validity of the Pennsylvania Fertilizer, Soil Conditioner and Plant Growth Substance Law, 3 P.S. §§68.1-68.19, and its method of enforcement as prescribed in the attendant regulations, 7 Pa. Code §§73.1-73.11. The appellants challenged the scheme on the basis that it is repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because the sampling and handling techniques of the Pennsylvania Department of Agriculture are admittedly inadequate to assure that what is tested is representative of the lot of fertilizer actually sampled and on the ground pursued here that the statutory scheme is so drawn as to allow a civil penalty to be imposed against a fertilizer manufacturer even when its fertilizer is admittedly not deficient in the nutrients that it is represented as containing.

The federal constitutional question was timely raised and has since been preserved by appellants in the initial notice of appeal submitted to the Secretary of Agriculture after appellants received notice of imposition of substantial civil penalties. The question was raised at the hearing before the Hearing Officer appointed by the Secretary and thereafter in the exception filed by appellants to the proposed order of the Hearing Officer filed on January 21, 1980. The Secretary overruled the exceptions and upheld the proposed order. Appellants petitioned the Commonwealth Court of Pennsylvania for review of the order of the Secretary raising the constitutional grounds as the reason for the appeal. On April 15, 1981 the Commonwealth Court upheld the action of the

Secretary, and failed to find that appellants' due process rights had been violated by the statutory scheme and its enforcement. Application for reargument before that court was denied on May 27, 1981 and appellants promptly petitioned the Supreme Court of Pennsylvania for allowance of appeal on the constitutional grounds raised from the beginning of the matter. The Pennsylvania Supreme Court declined to hear the appeal on September 14, 1981 leaving the order of the Commonwealth Court the final order in the matter. A notice of appeal to this Court was timely filed on December 1, 1981.

The jurisdiction of the United States Supreme Court to review this decision of the Pennsylvania Supreme Court and the Commonwealth Court of Pennsylvania on appeal is conferred by 28 U.S.C. §1257(2). The following decisions sustain the jurisdiction on appeal in this case: *Orr v. Orr,* 440 U.S. 268 (1979); *American Motorists Ins. Co. v. Starnes,* 425 U.S. 637 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statute in question, the constitutionality of which was upheld by the courts of Pennsylvania, is the Pennsylvania Fertilizer, Soil Conditioner and Plant Growth Substance Law, found at 3 P.S. §§68.1-68.19 (Purdon Supp., 1980). The sections relevant to this appeal are Sections 68.6, 68.7, and 68.8, which are set out in full in the appendix hereto. The regulations specified in Section 68.7 of the law, which are also in question in this appeal, are found at 7 Pa. Code §§73.7 and 73.8 and are set out in full in the appendix hereto.

STATEMENT OF THE CASE

The appellants herein are manufacturers of dry-blend fertilizer that is sold in bulk or in bags for consumption within the Commonwealth of Pennsylvania. Some fertilizer manufactured by appellant Central Chemical Corporation is manufactured in other states and shipped into the Commonwealth of Pennsylvania in interstate commerce for ultimate consumption by the farmer.

Dry-blend fertilizer differs from a chemically-blended fertilizer, in which all ingredients are chemically-blended into a homogeneous product, in that it is a mixture of three different ingredients: nitrogen, phosphoric acid, and potash. The three different ingredients are of different sizes, colors, and textures and are merely physically mixed together in one bag or bin, much like taking marbles of three different colors and sizes, putting them in a container, and shaking them up to mix them. Because the three ingredients are different in size and texture and are only mixed together, they have a proven tendency to separate and segregate as soon as the bag or bulk container is filled because gravity will pull the smaller particles down through the spaces between the larger ones. If agitated or moved, the largest particles have a tendency to rise to the top of the container. Thus, the composition of the mixture can be different in different places

within the container depending on the movement it has undergone and, therefore, the samples for testing can be different depending on how and from where they are taken.

This is the so-called "dilemma of segregation" that plagues the attempt to sample accurately a dry-blend fertilizer. This problem is addressed at length in the record and in the findings of the Secretary of Agriculture and in the opinion of the Commonwealth Court of Pennsylvania, as set out in the appendix hereto. The regulations were promulgated to enforce the statute in 1971 when the major fertilizer product was chemically-blended. This fertilizer is no longer widely manufactured because of serious environmental concerns. A chemically-blended fertilizer is homogeneous so that all of the particles are identical, containing all three ingredients. Thus, the regulations as developed contained no tolerance factor for sampling error because there basically was none. However, the regulations have *not* been changed even though the product manufactured by appellants is totally different and is subject to a substantial sampling error. The failure to account for this lends to the inevitable result that appellants' fertilizer will be found deficient in one or more nutrients even when admittedly it is not.

The final orders of the Secretary of Agriculture for the Commonwealth of Pennsylvania were issued on February 29, 1980 and upheld the assessment of penalties against both appellants. The orders found that the procedures used by the Department were fair and equitable and complied with the mandates of the statute but did not address the constitutionality issue. Appellants promptly petitioned the Commonwealth Court of Pennsylvania for review of the Secretary's order and again alleged that the entire scheme was an unconstitutional deprivation of their due process.

On April 15, 1981, the Commonwealth Court issued its opinion upholding the orders of the Secretary and upholding the

constitutionality of the statutory scheme despite agreeing with appellants' argument that the scheme is so drawn that it will and does permit the imposition of a substantial civil penalty even when the product manufactured by appellants is not deficient in its represented nutrients. The relevant language is as follows:

> "Petitioners argue that the investigational allowances presently in use were calculated based upon analyses of the previously mentioned 'chemically-blended' fertilizer. Since sampling this homogeneous fertilizer resulted in minimal sampling error the investigational allowances which were then calculated include substantially more allowance for analytical error — error occurring in the laboratory analysis — than for sampling error. Expert testimony in the record indicates that in sampling 'dry-blend,' non-homogeneous fertilizer which tends to separate over time, the sampling error is much higher. Petitioners conclude that use of the previously calculated investigational allowances is, therefore, unreasonable. In other words, Petitioners argue that the allowances presently used to determine the existence of deficiencies in their fertilizer were calculated based on a completely different type of fertilizer and that Petitioners' non-homogeneous fertilizer will often be found deficient when it actually meets its guaranteed analysis, due to the failure of the department to account for sampling error.
>
> We find Petitioners' argument to be persuasive; however, we do not agree that the investigational allowances now used are so unreasonable as to cause a violation of Constitutional rights."

S. H. Goss, Inc. v. Commonwealth of Pennsylvania, Department of Agriculture, ____ Pa. Cmwlth. ____, 428 A. 2d 731, 735 (1981).

The Commonwealth Court thus acknowledged explicitly that a substantial penalty could be imposed upon appellants even though their product was not deficient in the labeled nutrients. However, the court, while admitting that one innocent of wrongdoing is punished, held that this result was not so unreasonable as to deprive appellants of property rights without due process of law. The Pennsylvania Supreme Court refused to hear an appeal on this point, thereby leaving this the final judgment in the matter. The court apparently relied upon *Department of Environmental Resources v. Pennsylvania Power Company,* 490 Pa. 399, 416 A. 2d 995 (1980), which in turn relied upon this Court's holding in *Union Electric Company v. EPA,* 427 U.S. 246 (1976).

This reliance is not proper for two reasons. First, *DER v. Pennsylvania Power Company, supra,* held only that the Secretary of Environmental Resources could constitutionally impose a civil penalty upon the power company for violation of an air pollution regulation that was technologically impossible to be complied with. In that case there was no question that there was a violation; in this case, while the statutory scheme is impossible of compliance as it is drawn, there is the further issue that there is not even a violation in many cases when a penalty is imposed.

Second, the Pennsylvania Supreme Court's reliance on *Union Electric, supra* in *Pennsylvania Power, supra,* is misplaced. In *Union Electric* this Court specifically did *not* reach the point of asserting technological impossibility as a defense to an action for the collection of civil penalties based upon violations of regulations that are not possible of compliance. *Union Electric Co. v. EPA,* 427 U.S. 246, 268 n. 18. *Union Electric* merely held that a state had the power to promulgate air pollution regulations that are

incapable of being complied with under the present state of technology. Furthermore, in *Union Electric* there was no issue of whether or not there was actually a violation.

THE FEDERAL QUESTION IS SUBSTANTIAL

The precise question at issue in this case is a question of first impression in this Court and any other. The ability of a state to regulate the fertilizer industry is undisputed. On at least three occasions, this Court has upheld certain facets of regulation of the fertilizer industry by the states: *National Fertilizer Association v. Bradley,* 301 U.S. 178 (1937); *Jones v. Union Guano Co.,* 264 U.S. 171 (1924); *Patapsco Guano Co. v. Board of Agriculture,* 171 U.S. 345 (1898). In none of these cases, however, has the precise issue arisen of imposing a civil penalty against a fertilizer manufacturer even when its product is not deficient because of the manner in which the statutory scheme of regulation is drawn.

This case will also give this Court the opportunity to address the issue that it specifically did not address in *Union Electric Co. v. EPA,* 427 U.S. 246 (1976). In *Union Electric* the Court upheld the right of a state to promulgate regulations that are impossible of compliance under the current state of technology. In note 18 on page 268, a unanimous court indicated that the question of whether technological infeasibility as a defense to civil enforcement proceedings was not being addressed. The technological infeasibility involved in this matter, however, is much more than it is infeasible to make the fertilizer to comply with the regulations. The other major infeasibility, is impossible to get a proper determination of whether or not the fertilizer complies with the mandates of the statutory scheme of regulation without the statute and regulations containing a tolerance factor based upon sampling error as well as upon analytical error which is that small error inherent in the laboratory testing of the sample only. As was demonstrated constantly by appellants, this manner of drafting

the regulations means that appellants' dry-blend fertilizer will be found deficient in one or more nutrients even when it is not deficient and, as a result, a substantial civil penalty will be imposed upon appellants.

This issue, never previously addressed by this Court, falls squarely into that nebulous space between the holding in *Union Electric, supra,* and this Court's holding in *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974). In *Calero-Toledo,* the Court upheld the constitutionality of a statutory scheme providing for the forfeiture of personal property used in drug-dealing activities as against an innocent owner. Just as it is different from *Union Electric,* this case also has several important differences from the situation present in *Calero-Toledo.* First, this case does not involve a forfeiture, but the imposition of a substantial monetary penalty. Second, in *Calero-Toledo,* there is no question that there was a violation of the statute providing for the forfeiture by the lessee of the property, albeit unknown to the innocent owner of the property. Here the Commonwealth Court has found that there will be a penalty imposed on many occasions on which the fertilizer contains its guaranteed analysis and thereby complies with the requirements of the regulatory scheme so that there is no violation. Third, *Calero-Toledo* is actually a procedural due process case while this is a substantive due process case.

This Court has made it clear that a statutory scheme regulating business is constitutional if it seeks to achieve a legitimate state interest in protecting the public health, safety, and welfare and the means adopted is rationally related to the attainment of that objective. *Williamson v. Lee Optical Company,* 348 U.S. 483 (1955). There is certainly no question that Pennsylvania can regulate the fertilizer industry, if only to insure that the purchaser of fertilizer receives what he pays for. However, a scheme that permits, indeed encourages, the imposition of a penalty upon the

fertilizer manufacturer even when its fertilizer contains what it is represented to contain and the purchaser gets what he pays for is not rationally related to the state interest sought to be protected. While a regulatory scheme can normally easily pass the simple rational relationship test, the Court must agree that this is one instance in which a statutory scheme of regulation does not.

Many years ago, in *Grannis v. Ordean,* 234 U.S. 385 (1914), this Court held that the Due Process Clause does not impose an unattainable standard of accuracy. In this matter, the issue is precisely the opposite. The statutory scheme is invalid because it fails to impose an attainable standard of accuracy. Because the standard used is inaccurate, it, therefore, permits a substantial penalty to be imposed when there is no violation. There is nothing in the record nor in the opinion of the Commonwealth Court to suggest that the inclusion of a factor for sampling error in the regulatory tolerances is unattainable. In fact it is very attainable and the failure to use it is what deprives appellants of the process due them.

In summary, the Commonwealth Court of Pennsylvania found that the regulatory scheme was rationally related to the legitimate purpose of ensuring that fertilizer sold in Pennsylvania meets its guaranteed analysis. This opinion is impossible to justify on any reasonable basis as a scheme that permits a penalty to be imposed when there is no violation cannot be rationally related to insuring that the fertilizer contains what it is represented to contain. The scheme violates appellants' constitutional rights and should be found to be invalid by this Court.

CONCLUSION

The decision below upholding the regulatory scheme should be summarily reversed by this Court and the penalties imposed upon the appellants should be dismissed. Alternatively, this appeal should be accorded plenary review by the Court.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF COMMONWEALTH COURT SOUGHT TO BE REVIEWED

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 397 C.D. 1980

S.H. GOSS, INC.,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Respondent

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 398 C.D. 1980

CENTRAL CHEMICAL CORPORATION,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Respondent

Opinion and Order

BEFORE:

HONORABLE GENEVIEVE BLATT, Judge
HONORABLE JOHN A. MacPHAIL, Judge
HONORABLE ROBERT W. WILLIAMS, JR., Judge

ARGUED: February 5, 1981

OPINION BY JUDGE MacPHAIL Filed April 15, 1981

This is a consolidated appeal brought by S.H. Goss, Inc. and Central Chemical Corp. (Petitioners) from two orders of the Pennsylvania Department of Agriculture (Department) which upheld a total of 125 penalties assessed against Petitioners for deficiencies in fertilizers which they manufactured.[1] The penalties were imposed pursuant to the Pennsylvania Fertilizer, Soil Conditioner and Plant Growth Substance Law (Law).[2] We affirm.

Petitioners in the instant case are manufacturers of fertilizer which is sold in bags or in bulk to consumers. Under the Law it is the duty of the Secretary of Agriculture (Secretary) to sample, inspect and analyze such fertilizer to determine whether the product meets the guarantee as stated on its label. For example, a sample of a fertilizer labeled "10-10-10" would be analyzed by the Department to determine if it contains, within specific investigational allowances, 10 percent nitrogen, 10 percent phosphoric acid and 10 percent potash. If any ingredient, when analyzed, falls below the guarantee a penalty of ten times the value of the deficiency must be assessed by the Secretary. Section 7 of the Law, 3 P.S. §68.7. The Secretary is given the power to promulgate rules and regulations regarding methods of sampling, inspection and analysis and to establish minimum standards for such sampling, inspection and analysis. Section 6(b) of the Law, 3 P.S. §68.6(b).

Petitioners challenged the Department's assessment of penalties on several grounds including the inadequacy of the sampling procedures used, lack of precision in the operation of the laboratory (the chemical analysis procedure itself has not been challenged) and the failure to include sufficient sampling error in the investigational allowances. After several hearings on the matter during which an extensive record was developed, the hearing examiner found each of the challenges to be without merit. The Secretary adopted the examiner's findings and ordered payment of the assessed penalties. these appeals followed.

The issues presented for our consideration are: 1) whether the operation of the laboratory and the sampling procedures used by the Department act to deprive Petitioners of property without due process of law; 2) whether the present investigational allowances which include minimum allowances for sampling error act to deprive Petitioners of due process of law; and 3) whether the decisions and orders of the Secretary are supported by substantial evidence in the record.

We note preliminarily that our scope of review here is limited. We must determine whether the adjudications appealed from violate the constitutional rights of the Petitioners, whether an error of law has been committed or whether any necessary finding of fact is not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

I

Petitioners' first argument is that the laboratory operation and sampling procedures used in inspecting their fertilizers were so unreasonable as to cause a deprivation of their right to due process of law. Specifically, Petitioners argue that they should have

been notified when fertilizer samples were to be taken, that the sampling technique currently used by inspectors is inadequate to obtain a representative sample of "dry-blend" fertilizer, that adequate steps are not taken to ensure that the sample is not adulterated and that the laboratory procedures are performed in a less than precise manner.

With regard to the notice issue and alleged careless handling of the samples from the time they are taken through their analysis in the laboratory, we fail to find any deprivation of due process. While one manual used by inspectors does suggest that samples should be taken in the presence of the fertilizer manufacturer nothing in the Law or regulations requires such notice. We have been presented with and find no constitutional infirmity in the Department's failure to notify the manufacturer as to when and where each inspection is to occur. Since consumers may request that fertilizer which they have purchased be inspected, the inspections often occur at locations distant from the place of manufacture. Our conclusion that no constitutional violation occurs as a result of the failure to notify is supported by the provision in Section 6(d) of the Law which provides that, "Upon request, the secretary shall furnish to the registrant a portion of any sample found subject to penalty or other legal action." 3 P.S. §68.6(d). We believe that Petitioners' rights are adequately protected thereby. Our review of the record also discloses no constitutional deprivation as a result of the procedures used by the Department in handling official samples, although we certainly encourage precision in the handling and testing of the samples.

With respect to the adequacy of the sampling technique used we note that the examiner found based on substantial evidence that the Department followed the procedures required by Department regulations.[3] A constitutional attack on the technique itself, therefore, is a challenge to the Department's regulations.

In reviewing the constitutionality of regulations it is a basic premise that the Commonwealth may in the exercise of its police power enact regulations in order to protect the health, safety and welfare of its citizens even though those regulations might impinge on individual property rights. *Department of Environmental Resources v. Pennsylvania Power Co.*, 490 Pa. 399, 416 A.2d 995 (1980). The rule used to judge whether there has been an unconstitutional exercise of the police power states that:

> To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. *The legislature may not,* under the guise of protecting the public interests, *arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.* (Emphasis added.)

Commonwealth v. Barnes and Tucker Co., 472 Pa. 115, 123, 371 A.2d 461, 465, *appeal dismissed,* 434 U.S. 807 (1977) (quoting *Lawton v. Steele,* 152 U.S. 133, 137 (1894)). A heavy burden is imposed on one who challenges the constitutionality of the exercise of the police power. *Barnes and Tucker Co., supra.*

Before addressing the merits of Petitioners' challenge we deem it necessary to briefly explain the theory of "segregation" which is the basis of Petitioners' challenge to the method of sampling as well as to the calculation of investigational allowances. The fertilizers here involved are made up of different sized particles,

each of which contain one chemical ingredient (nitrogen, phosphoric acid or potash). The fertilizer is simply a "dry-blend", or mixture, of these three ingredients as opposed to a "chemical-blend" in which each particle would contain all three of the ingredients. Although these non-homogeneous particles are thoroughly mixed by the manufacturer, once the fertilizer leaves the blending machine the smaller particles tend, over time, to settle to the bottom of their container leaving the larger particles on top. The problem of obtaining a representative sample once this segregation process begins is addressed by Petitioners' challenge.

The method of sampling bagged fertilizer used by the Department is that adopted by the Association of Official Analytical Chemists (AOAC), an organization made up, in part, of fertilizer industry professionals which adopts official testing and sampling procedures. The method involves inserting a probe, measuring in length approximately thirty-six inches, diagonally from one corner of the bag through the middle and to the opposite corner of the bag. One sample from each of ten bags in a lot of fertilizer is thus obtained. The ten samples are then combined and divided in half. One of the halves becomes the "official sample" and is transported to the laboratory for analysis.

Petitioners argue that this method of sampling, due to the segregation problem, is inadequte to obtain a representative sample of a lot of fertilizer and that civil penalties imposed as result of deficiencies found in such a sample are unconstitutional. We must disagree.

Petitioners introduced expert testimony that a single probe inserted into a bag of fertilizer would not produce a representative sample from that bag and that three probes inserted into a single bag were necessary. The same expert testified, however, that the

"corner to corner" sampling technique used by the Department does compensate to some degree for the segregation problem. Other expert testimony challenged the adequacy of using only ten probes, no matter the size of the lot, to obtain a representative sample of the entire lot. Keeping in mind that the means used to accomplish the public purpose, here ensuring that fertilizers sold to consumers contain that which is guaranteed must be reasonably related to that purpose, we find no violation of constitutional rights. While use of additional samples would likely increase the probability of obtaining a truer representation of the fertilizer lot, we cannot agree that the method now used is either unreasonable or invalid. Based on our review of the record we conclude that the sampling method used is reasonable and that Petitioners have failed to sustain their burden of proving a violation of their constitutional rights.

II

Petitioners' next argument is that the investigational allowances used in determining the existence of deficiencies are unconstitutional because they do not include sufficient sampling error allowances. Petitioners argue that the investigational allowances presently in use were calculated based upon analyses of the previously mentioned "chemically-blended" fertilizer. Since sampling this homogeneous fertilizer[4] resulted in minimal sampling error the investigational allowances which were then calculated include substantially more allowance for analytical error — error occurring in the laboratory analysis — than for sampling error. Expert testimony in the record indicates that in sampling "dry-blend," non-homogeneous fertilizer which tends to separate over time, the sampling error is much higher. Petitioners conclude that use of the previously calculated investigational allowances is, therefore, unreasonable. In other words, Petitioners argue that the allowances presently used to determine the existence of

deficiencies in their fertilizer were calculated based on a completely different type of fertilizer and that Petitioners' non-homogeneous fertilizer will often be found deficient when it actually meets its guaranteed analysis, due to the failure of the Department to account for sampling error.

We find Petitioners' argument to be persuasive; however, we do not agree that the investigational allowances now used are so unreasonable as to cause a violation of constitutional rights. We note that the Law specifically provides that, "It is the legislative intent that the Department of Agriculture, so far as practicable, adopt the tolerances established in the current Model Regulations printed in the annual publications of the Association of American Plant Food Control Officials [AAPFCO]." Section 7(a) of the Law, 3 P.S. §68.7(a). In interpreting and construing statutes we must "ascertain and effectuate the intention of the General Assembly." Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. §1921(a). We find that the legislature's reliance on the calculations of the AAPFCO is reasonable and believe that Petitioners' appropriate remedy is to effect change through the AAPFCO. We are mindful that:

> The power of judicial investigation does not concern itself with the wisdom of the policy emanating from the legislative branch, or whether the best of all possible means of achieving the desired result has been selected. It is concerned only with the questions of whether the statute has a recognized police purpose, and whether it has a reasonable relation to the object to be attained.

Bortz Coal Co. v. Commonwealth, 2 Pa. Commonwealth Ct. 441, 451, 279 A.2d 388, 394 (1971) (quoting *White's Appeal,* 287 Pa.

259, 265, 134 A. 409, 411 (1926)). We conclude that the means adopted by the legislature are reasonably related to the legitimate purpose of ensuring that fertilizer sold in the Commonwealth meets its guaranteed analysis.

III

Petitioners' final argument is that the decisions and orders of the Secretary are not supported by substantial evidence. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Bortz Coal Co., supra.* We repeat that Petitioners bore a heavy burden of proving the invalidity of the Department's procedures. We find that, based upon the Department's detailed description of the sampling and laboratory procedures used in analyzing Petitioners' fertilizer, there is clearly substantial evidence to support the Secretary's conclusion that the procedures are adequate and appropriate.[5]

Orders affirmed.

s/ John A. MacPhail
John A. MacPhail, Judge

Judge Wilkinson, Jr. did not participate
in the decision in this case.

FOOTNOTES

1. S.H. Goss, Inc. was assessed for 39 penalties totaling $24,849.66 and Central Chemical Corp. was assessed for 86 penalties totaling $31,411.35. The penalties were assessed during 1978.

2. Act of May 29, 1956, P.L. (1955) 1795, *as amended,* 3 P.S. §68.1 et seq.

3. Department regulations provide that procedures adopted by the Association of Official Analytical Chemists (AOAC) for obtaining samples, sample preparation and analysis shall be used. 7 Pa. Code §73.8(c) and (d).

4. Petitioners' brief indicates that the "chemically-blended" fertilizer is no longer manufactured by Petitioners due to high expense in the blending process and unspecified environmental considerations.

5. We also conclude, therefore, that the Secretary's findings are based upon evidence in the record apart from the four scientific articles submitted by the Department which Petitioners objected to as hearsay.

Opinion and Order

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 397 C.D. 1980

S.H. GOSS, INC.,

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CENTRAL CHEMICAL CORPORATION,

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v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Respondent

ORDER

AND NOW, this 15th day of April, 1981, the orders of the Secretary of Agriculture dated February 2, 1980 at Docket Nos. 78-1 and 78-2 are hereby affirmed.

s/ John A. MacPhail
John A. MacPhail, Judge

Certified from the Record
Apr. 15, 1981

s/ Francis C. Barbush
Chief Clerk

PROPOSED ORDER OF HEARING OFFICER RE: S.H. GOSS, INC.

Law Offices
KRANK, GROSS & CASPER
Suite H 1801 North Front Street
Harrisburg, Pennsylvania 17102
717-234-4931

Lancaster Office
Suite 338 Park City Center
Lancaster, Pa. 17601
717-299-7327

William M. Gross
Donald F. Krank
Edgar R. Casper

December 21, 1979

Hon. Penrose Hallowell
Secretary
Department of Agriculture
2301 N. Cameron Street
Harrisburg, PA 17120

Re: In re S.H. Goss, Inc.,
Docket No. 78-1

Dear Sir:

I was appointed hearing examiner in the above case. Hearings were duly held and proceedings were conducted, partly in conjunction with the case of In re Central Chemical Corporation, Docket No. 78-2.

Proposed Order of Hearing Officer Re: S.H. Goss, Inc.

As a result of the evidence submitted at the hearings and my review of the proceedings, I recommend issuance by the Department of Agriculture of an adjudication substantially in accordance with the proposed adjudication attached hereto. This proposed adjudication imposes guaranty deficiency penalties upon the respondent in each of 39 cases that were subjects of the proceedings.

I have spoken at length with John Childe about the form my report to you should take and I believe the attached is appropriate in that regard. However, if you or counsel believe there is any further report I should make in connection with these proceedings, please advise and I will be happy to comply.

This report is being submitted to you through John Childe.

Sincerely,

s/ William M. Gross
William M. Gross

rls

Proposed Order of Hearing Officer Re: S.H. Goss, Inc.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA DEPARTMENT OF AGRICULTURE

In re:	:	
	:	Docket No. 78-1
S.H. GOSS, INC.	:	

REPORT OF HEARING EXAMINER

WILLIAM M. GROSS
KRANK, GROSS & CASPER
1801 N. FRONT STREET
HARRISBURG, PENNSYLVANIA 17102
(717) 234-4931

Proposed Order of Hearing Officer Re: S.H. Goss, Inc.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA DEPARTMENT OF AGRICULTURE

In re:	:	
	:	Docket No. 78-1
S.H. GOSS, INC.	:	

ADJUDICATION

This case involves 39 orders issued by the Pennsylvania Department of Agriculture upon S.H. Goss, Inc., hereinafter the "Company", wherein guaranty deficiency penalties were assessed pursuant to the provisions of the Pennsylvania Fertilizer Law of 1956, the Act of May 29, 1956, P.L. (1955) 1795, 3 P.S. §68.1 et seq. A hearing was held during which the Department presented testimony and evidence to support its claims that the orders in question were improperly issued.

Both parties were represented by counsel throughout these proceedings. The record is extensive and detailed and has been thoroughly reviewed.

DISCUSSION

The Company raised several major points in its appeal which included attacks upon the sampling procedures and the laboratory procedures utilized by the Department under the Fertilizer Law.

One point offered by the Company was that it should have had notice of any inspection and the opportunity to be present. Under the circumstances, however, this was unrealistic. Moreover, and perhaps more important, there is nothing in the record to indicate or suggest that the absence of the company in any way affected the results or the inspection or of the testing that followed.

Proposed Order of Hearing Officer Re: S.H. Goss, Inc.

The Company also attempted to show that the sampling and laboratory procedures were inadequate. However, a detailed review of the testimony and the other evidence indicates that the Department followed standard and accepted governmental regulatory procedures. Its results were consistent and, whenever there was a doubt, it was resolved in the Company's favor. If, in fact, the Department erred in its sampling or analyzing procedures, it seems to us that direct evidence in support of this contention could have been presented. That the Department might have used "better" procedures does not destroy the import of the results it obtained from the procedures it did use and which we find were adequate and appropriate under the circumstances.

Because we disagree with the Company's contentions as to the sampling and laboratory procedures of the Department, it follows that we also must disagree with the argument that there is any deprivation of property without due process of law. The Company complains of an "unfairness" that just isn't evidenced by the facts.

In attacking the legal basis under which the penalties were assessed, the Company argues that there are serious problems with the regulations promulgated by the Department. We have thoroughly reviewed the Company's arguments, however, and find that they provide no basis for disturbing the penalty assessments. As long as the sampling and laboratory procedures were adequate and were properly followed, and we have found that they were, then it follows that the penalties were properly assessed.

FINDINGS

1. S.H. Goss, Inc. (the Company) is located at Box 426, Lewistown, Pa. 17044 and is engaged in the manufacture of

fertilizer which is sold in bags and in bulk to farmers and other consumers.

2. From time to time the Department made various inspections and investigations to determine whether there were deficiencies in the fertilizer sold by S.H. Goss, Inc.

3. As a result of these inspections and investigations, including various laboratory analyses that were done in connection therewith, the Department determined that S.H. Goss, Inc. should be assessed deficiency guaranty penalties under the Pennsylvania Fertilizer Law of 1956.

4. The sampling procedures utilized by the Department in making its inspection and investigations were appropriate and adequate to fairly provide representative samples of the product for which the Company is responsible with respect to its guarantees.

5. The laboratory analyses were appropriate and adequate to provide the technical information necessary to establish whether or not the guarantees were met.

6. With respect to each of the original orders, the penalty imposed was either correctly stated by the Department or, in some cases, should be modified because of additional evidence presented to the Department as a result of these proceedings. A complete list of the applicable penalties is set forth in Exhibit "A", attached hereto and incorporated herein.

7. This proceeding is properly before the Pennsylvania Department of Agriculture pursuant to the provisions of the Administrative Agency Law.

Proposed Order of Hearing Officer Re: S.H. Goss, Inc.

8. The Department has complied with all notice requirements and with other provisions of the Pennsylvania Fertilizer Law of 1956.

ORDER

The appeal of S.H. Goss, Inc. from 39 orders of the Pennsylvania Department of Agriculture assessing deficiency guaranty penalties under the Pennsylvania Fertilizer law of 1956 is denied and S.H. Goss, Inc. is directed to pay the sum of *$24,849.66* to the Pennsylvania Department of Agriculture in accordance with the provisions of the law.

Secretary of Agriculture

Proposed Order of Hearing Officer Re: S.H. Goss, Inc.

In Re: S.H. GOSS, INC., Docket No. 78-1
Exhibit "A" to Adjudication
Guaranty Deficiency Penalties

Chemist's Number	Amount
1074	211.25
1075	1,363.50
1076	765.00
1234	171.60
1235	94.40
1236	1,260.00
1237	106.40
1383	1,400.00
1508	1,659.00
1509	52.40
1724	666.00
1725	1,755.00
1885	25.00
1886	1,642.00
1933	632.00
1934	854.61
1935	1,384.00
1936	181.44
2023	1,156.00
2024	1,072.40
2136	315.00
2137	72.50
2245	408.93
2246	195.60
2247	199.50
2181	237.00
2356	99.20

Proposed Order of Hearing Officer Re: S.H. Goss, Inc.

2358		175.20
2478		1,616.50
2479		1,765.66
2481		1,819.53
2511		229.50
2512		210.00
2513		272.00
2514		348.00
2596		120.25
2597		207.57
2617		49.56
2618		56.16
	Total	$24,849.66

PROPOSED ORDER OF HEARING OFFICER RE: CENTRAL CHEMICAL CORPORATION

Law Offices
KRANK, GROSS & CASPER
Suite H 1801 North Front Street
Harrisburg, Pennsylvania 17102
717-234-4931

Lancaster Office
Suite 338 Park City Center
Lancaster, Pa. 17601
717-299-7327

William M. Gross
Donald F. Krank
Edgar R. Casper

December 21, 1979

Hon. Penrose Hallowell
Secretary
Department of Agriculture
2301 N. Cameron Street
Harrisburg, PA 17120

Re: In re Central Chemical Corporation
Docket No. 78-2

Dear Sir:

I was appointed hearing examiner in the above case. Hearings were duly held and proceedings were conducted, partly in conjunction with the case of In re S.H. Goss, Inc., Docket No. 78-1.

23a

Proposed Order of Hearing Officer Re: Central Chemical Corporation

As a result of the evidence submitted at the hearings and my review of the proceedings, I recommend issuance by the Department of Agriculture of an adjudication substantially in accordance with the proposed adjudication attached hereto. This proposed adjudication imposes guaranty deficiency penalties upon the respondent in each of 86 cases that were subjects of the proceedings.

I have spoken at length with John Childe about the form my report to you should take and I believe the attached is appropriate in that regard. However, if you or counsel believe there is any further report I should make in connection with these proceedings, please advise and I will be happy to comply.

This report is being submitted to you through John Childe.

Sincerely,

s/ William M. Gross
William M. Gross

rls

Proposed Order of Hearing Officer Re: Central Chemical Corporation

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA DEPARTMENT OF AGRICULTURE

In re: :
: Docket No. 78-2
CENTRAL CHEMICAL
CORPORATION :

REPORT OF HEARING EXAMINER

WILLIAM M. GROSS
KRANK, GROSS & CASPER
1801 N. FRONT STREET
HARRISBURG, PENNSYLVANIA 17102
(717) 234-4931

Proposed Order of Hearing Officer Re: Central Chemical Corporation

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA DEPARTMENT OF AGRICULTURE

In re: :
: Docket No. 78-2
CENTRAL CHEMICAL
CORPORATION :

ADJUDICATION

This case involves 88 orders issued by the Pennsylvania Department of Agriculture upon Central Chemical Corporation, hereinafter the "Company", wherein guaranty deficiency penalties were assessed pursuant to the provisions of the Pennsylvania Fertilizer Law of 1956, the Act of May 29, 1956, P.L. (1955) 1795, 3 P.S. §68.1 et seq. A hearing was held during which the Department presented testimony and evidence to support its claims that the orders in question were improperly issued.

Both parties were represented by counsel throughout these proceedings. The record is extensive and detailed and has been thoroughly reviewed.

DISCUSSION

The Company raised several major points in its appeal which included attacks upon the sampling procedures and the laboratory procedures utilized by the Department under the Fertilizer Law.

One point offered by the Company was that it should have had notice of any inspection and the opportunity to be present. Under the circumstances, however, this was unrealistic. Moreover,

and perhaps more important, there is nothing in the record to indicate or suggest that the absence of the company in any way affected the results or the inspection or of the testing that followed.

The Company also attempted to show that the sampling and laboratory procedures were inadequate. However, a detailed review of the testimony and the other evidence indicates that the Department followed standard and accepted governmental regulatory procedures. Its results were consistent and, whenever there was a doubt, it was resolved in the Company's favor. If, in fact, the Department erred in its sampling or analyzing procedures, it seems to us that direct evidence in support of this contention could have been presented. That the Department might have used "better" procedures does not destroy the import of the results it obtained from the procedures it did use and which we find were adequate and appropriate under the circumstances.

Because we disagree with the Company's contentions as to the sampling and laboratory procedures of the Department, it follows that we also must disagree with the argument that there is any deprivation of property without due process of law. The Company complains of an "unfairness" that just isn't evidenced by the facts.

In attacking the legal basis under which the penalties were assessed, the Company argues that there are serious problems with the regulations promulgated by the Department. We have thoroughly reviewed the Company's arguments, however, and find that they provide no basis for disturbing the penalty assessments. As long as the sampling and laboratory procedures were adequate and were properly followed, and we have found that they were, then it follows that the penalties were properly assessed.

Proposed Order of Hearing Officer Re: Central Chemical Corporation

FINDINGS

1. Central Chemical Corporation (the Company) is located at 49 Jonothan Street, Hagerstown, Md. 21740 and is engaged in the manufacture of fertilizer which is sold in bags and in bulk to farmers and other consumers.

2. From time to time the Department made various inspections and investigations to determine whether there were deficiencies in the fertilizer sold by Central Chemical Corporation.

3. As a result of these inspections and investigations, including various laboratory analyses that were done in connection therewith, the Department determined that Central Chemical Corporation should be assessed deficiency guaranty penalties under the Pennsylvania Fertilizer Law of 1956.

4. The sampling procedures utilized by the Department in making its inspection and investigations were appropriate and adequate to fairly provide representative samples of the product for which the Company is responsible with respect to its guarantees.

5. The laboratory analyses were appropriate and adequate to provide the technical information necessary to establish whether or not the guarantees were met.

6. The original guaranty deficiency penalties have been reviewed and a list of the penalties that should be imposed is set forth in Exhibit "A", attached hereto and incorporated herein.

Proposed Order of Hearing Officer Re: Central Chemical Corporation

7. This proceeding is properly before the Pennsylvania Department of Agriculture pursuant to the provisions of the Administrative Agency Law.

8. The Department has complied with all notice requirements and with other provisions of the Pennsylvania Fertilizer Law of 1956.

ORDER

The appeal of Central Chemical Corporation from 86 orders of the Pennsylvania Department of Agriculture assessing deficiency guaranty penalties under the Pennsylvania Fertilizer law of 1956 is denied and Central Chemical Corporation is directed to pay the sum of $*31,411.35* to the Pennsylvania Department of Agriculture in accordance with the provisions of the law.

Secretary of Agriculture

ORDER OF SECRETARY OF AGRICULTURE RE: S.H. GOSS, INC.

PENNSYLVANIA DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
FERTILIZER PENALTIES

FINAL ORDER ON PENALTIES IMPOSED
AGAINST S.H. GOSS, INC.
DURING THE PERIOD OF 1978

This order modifies the order of February 1, 1980, which is the final decision of the Department after a full administrative hearing to require payment of S.H. Goss, Inc. for each and all of the 39 deficiencies which was the subject of the administrative hearing and are as noted in the attachment hereto, with interest accrued from the time of the assessment of the penalties amounting to 6% per annum.

This final order is based on the following findings and reasons;

1. The Pennsylvania Department of Agriculture has the legislative duty under the terms of the Pennsylvania Fertilizer Law to sample, inspect and analyze fertilizers manufactured for sale in Pennsylvania.

2. The Pennsylvania Department of Agriculture did inspect, sample and analyze fertilizers manufactured by S.H. Goss, Inc. on at least 39 separate occasions during 1978, as noted in the Department's official report form for each individual inspection.

3. The results of the analysis of these inspections were that each lot of fertilizer inspected was deficient in one or more of the primary ingredients of the fertilizer as advertised by S.H. Goss,

Inc., and as noted in the official report form of each individual inspection.

4. Based on the amount of the deficiencies of each analysis, the Pennsylvania Department of Agriculture did impose a fine upon S.H. Goss, Inc. for each of the inspections in question.

5. S.H. Goss, Inc. did appeal the fines imposed for each of these inspections and did request from the Secretary a Supersedeas of the fines until the appeal was completed.

6. The Secretary of Agriculture did grant the Supersedeas, appointed a hearing examiner and held a full administrative hearing on the 39 separate inspections and deficiencies thereof.

7. S.H. Goss, Inc. raised several issues during the administrative hearing including objections to the sampling procedures and inspection procedures and the legal basis under which the penalties are assessed.

8. The hearing examiner found the Department's sampling inspection procedures to be adequate, fair and within the terms of accepted governmental regulatory procedures; and that petitioners offered no direct evidence of error in the procedures. The examiner's report is attached hereto and made a part of this order.

9. The sampling procedures, the inspection procedures, and the procedures for testing and analyzing the fertilizers are the best known scientific means for conducting a fair and impartial regulatory fertilizer inspection program.

Order of Secretary of Agriculture Re: S.H. Goss, Inc.

10. The agents of the Department did in fact comply with the required inspection sampling procedures. The Department laboratory did in fact comply with the required testing and analyzing procedures, and the deficiencies were computed within the terms of the Pennsylvania Fertilizer Law.

Based upon the above findings and reasons, the payment of the fines and penalties assessed against S.H. Goss, Inc., based on the amounts listed in the attachment hereto, as well as interest of 6% accruing from the time of the completion of the inspection report, is hereby required.

s/ Penrose Hallowell — 2-29-80
PENROSE HALLOWELL — Date
SECRETARY OF
AGRICULTURE

Order of Secretary of Agriculture Re: S.H. Goss, Inc.

In Re: S.H. GOSS, INC., Docket No. 78-1
Exhibit "A" to Adjudication
Guaranty Deficiency Penalties

Chemist's Number	Amount
1074	211.25
1075	1,363.50
1076	765.00
1234	171.60
1235	94.40
1236	1,260.00
1237	106.40
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2024	1,072.00
2136	315.00
2137	72.50
2245	408.93
2246	195.60
2247	199.50
2181	237.00
2356	99.20

2358		175.20
2478		1,616.50
2479		1,765.66
2481		1,819.53
2511		229.50
2512		210.00
2513		272.00
2514		348.00
2596		120.25
2597		207.57
2617		49.56
2618		56.16
	Total	$24,849.66

ORDER OF SECRETARY OF AGRICULTURE RE: CENTRAL CHEMICAL CORP.

PENNSYLVANIA DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
FERTILIZER PENALTIES

FINAL ORDER ON PENALTIES IMPOSED AGAINST CENTRAL CHEMICAL CORPORATION DURING THE PERIOD OF 1978

This order modifies the order of February 1, 1980, which is the final decision of the Department after a full administrative hearing to require payment of Central Chemical Corporation for each and all of the 86 deficiencies which was the subject of the administrative hearing and are as noted in the attachment hereto, with interest accrued from the time of the assessment of the penalties amounting to 6% per annum.

This final order is based on the following findings and reasons;

1. The Pennsylvania Department of Agriculture has the legislative duty under the terms of the Pennsylvania Fertilizer Law to sample, inspect and analyze fertilizers manufactured for sale in Pennsylvania.

2. The Pennsylvania Department of Agriculture did inspect, sample and analyze fertilizers manufactured by Central Chemical Corporation on at least 86 separate occasions during 1978, as noted in the Department's official report form for each individual inspection.

3. The results of the analysis of these inspections were that each lot of fertilizer inspected was deficient in one or more of

the primary ingredients of the fertilizer as advertised by Central Chemical Corporation, and as noted in the official report form of each individual inspection.

4. Based on the amount of the deficiencies of each analysis, the Pennsylvania Department of Agriculture did impose a fine upon Central Chemical Corporation for each of the inspections in question.

5. Central Chemical Corporation did appeal the fines imposed for each of these inspections and did request from the Secretary a Supersedeas of the fines until the appeal was completed.

6. The Secretary of Agriculture did grant the Supersedeas, appointed a hearing examiner and held a full administrative hearing on the 86 separate inspections and deficiencies thereof.

7. Central Chemical Corporation raised several issues during the administrative hearing including objections to the sampling procedures and inspection procedures and the legal basis under which the penalties are assessed.

8. The hearing examiner found the Department's sampling inspection procedures to be adequate, fair and within the terms of accepted governmental regulatory procedures; and that petitioners offered no direct evidence of error in the procedures. The examiner's report is attached hereto and made a part of this order.

9. The sampling procedures, the inspection procedures, and the procedures for testing and analyzing the fertilizers are the best known scientific means for conducting a fair and impartial regulatory fertilizer inspection program.

10. The agents of the Department did in fact comply with the required inspection sampling procedures. The Department laboratory did in fact comply with the required testing and analyzing procedures, and the deficiencies were computed within the terms of the Pennsylvania Fertilizer Law.

Based upon the above findings and reasons, the payment of the fines and penalties assessed against Central Chemical Corporation, based on the amounts listed in the attachment hereto, as well as interest of 6% accruing from the time of the completion of the inspection report, is hereby required.

s/ Penrose Hallowell 2-29-80
PENROSE HALLOWELL Date
SECRETARY OF
AGRICULTURE

Order of Secretary of Agriculture Re: Central Chemical Corp.

In Re: CENTRAL CHEMICAL CORPORATION, Docket No. 78-2

Exhibit "A" to Adjudication
Guaranty Deficiency Penalties

Chemist's Number	Amount	Chemist's Number	Amount
22	152.25	1954	528.94
23	74.76	1959	157.00
26	78.00	1958	1,291.50
49	78.00	1960	233.00
800	2,624.00	2032	880.00
802	57.20	2073	221.00
872	260.48	2074	243.54
874	353.28	2077	2,253.59
894	70.00	2078	792.00
947	336.75	2079	126.10
1079	254.10	2098	181.50
1230	47.60	2121	300.80
1231	48.40	2122	97.50
1233	385.92	2192	188.94
1247	344.40	2193	284.80
1315	834.60	2194	612.72
1316	820.00	2196	199.32
1446	32.40	2205	283.50
1447	109.60	2206	805.68
1449	296.80	2353	178.00
1555	189.00	2402	237.00
1556	608.00	2406	168.00
1557	335.20	2407	219.96
1558	880.60	2502	175.50
1559	1,401.40	2503	481.00
1597	484.00	2504	261.00

Order of Secretary of Agriculture Re: Central Chemical Corp.

1600	305.50	2521	154.00
1601	436.80	2523	71.25
1602	94.72	2528	47.25
1646	77.20	2554	438.38
1647	101.60	2560	228.00
1648	394.40	2569	141.00
1749	138.00	2570	623.70
1750	49.83	2571	316.50
1751	14.96	2572	824.00
1752	28.80	2574	1,193.75
1753	24.50	2576	1,020.50
1893	147.35	2561	186.75
1895	222.00	2562	98.50
1896	55.80	2654	372.00
1898	158.40	2656	33.20
1899	119.00	2657	310.08
1937	117.00		
1938	308.00		
		Total	$31,411.35

OTHER ORDERS OF COMMONWEALTH COURT

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 397 C.D. 1980

S.H. GOSS, INC.,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Respondent

NO. 398 C.D. 1980

CENTRAL CHEMICAL CORPORATION,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Respondent

Other Orders

ORDER

NOW, April 30, 1981, petitioners having filed an application for reargument, respondent, pursunt to Pa. R.A.P. 2545, shall file an answer to said application for reargument, which answer shall be filed and served on or before May 11, 1981.

s/ John A. MacPhail
J.

Certified from the Record
May 1, 1981

s/ Francis C. Barbush
Chief Clerk

Other Orders

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NO. 397 C.D. 1980

NO. 398 C.D. 1980

S.H. GOSS, INC.,

Petitioner

CENTRAL CHEMICAL CORPORATION,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Respondent

O R D E R

NOW, May 27, 1981, having considered petitioners' application for reargument and respondent's answer thereto, said application is hereby denied.

BY THE COURT:

s/ Genevieve Blatt
J.

Certified from the Record
May 28, 1981

s/ Francis C. Barbush
Chief Clerk

ORDER OF PENNSYLVANIA SUPREME COURT DENYING PETITION FOR ALLOWANCE OF APPEAL

SUPREME COURT OF PENNSYLVANIA

Middle District

Carl Rice, Esq.
Prothonotary

Mildred E. Williamson
Deputy Prothonotary

434 Main Capitol Building
P.O Box 624
Harrisburg, Pennsylvania 17108
(717) 787-6181

September 17, 1981

David C. Keiter, Esquire
Wayde P. Seidensticker, Esquire
55 South Queen Street
York, Pa. 17403

Re: S.H. Goss, Inc., Petitioner v.
Com. of Pa., Dept. of Agriculture
Central Chemical Corp., et al.
No. 73 M.D. MISC. DK., 1981

Dear Mr. Kelter & Mr. Seidensticker:

This is to advise you that on September 14, 1981, the Supreme Court entered its Order denying the Petition for Allowance of Appeal in the above-captioned matter.

Very truly yours,

s/ Mildred E. Williamson
Deputy Prothonotary

MEW/sb
cc: John B. Lampi, Esquire

FULL TEXT OF RELEVANT STATUTES AND REGULATIONS

3 P.S. §68.6 Inspection, sampling, analysis

"(a) It shall be the duty of the secretary to sample, inspect, make analysis of, and test fertilizers, soil conditioners or plant growth substances distributed within this Commonwealth at reasonable times and places and to such an extent as he may deem necessary to determine whether such fertilizers, soil conditioners or plant growth substances are in compliance with the provisions of this act. The secretary may enter upon any public or private premises during regular business hours in order to have access to fertilizers, soil conditioners or plant growth substances subject to the provisions of this act and the rules and regulations pertaining thereto.

(b) The methods of sampling, inspection and analysis shall be those adopted in accordance with rules and regulations promulgated by the Secretary of Agriculture. Such rules and regulations shall establish minimum standards for such sampling, inspection and analysis as well as the procedure and methods to be used in making them.

(c) The secretary, in determining for administrative purposes whether any fertilizer is deficient in plant food, shall be guided solely by the official sample as defined in clause (8) of section 2,[1] and obtained and analyzed as provided for in subsection (b) of section 6.

---

1. Section 68.2 of this title.

(d) Upon request, the secretary shall furnish to the registrant a portion of any sample found subject to penalty or other legal action. As amended 1971, Aug. 12, P.L. 334, No. 85, §4; 1977, Dec. 1, P.L. 258, No. 86, §7, effective in 60 days."

3 P.S. §68.7 Plant nutrient deficiency

"(a) If the analysis shows that any fertilizer falls short of the guaranteed analysis in any one ingredient, a penalty of ten times the value of the deficiency shall be assessed by the secretary against the manufacturer in accordance with tolerances that the Department of Agriculture shall promulgate within one year from this enactment. It is the legislative intent that the Department of Agriculture, so far as practicable, adopt the tolerances established in the current Model Regulations printed in the annual publications of the Association of American Plant Food Control Officials. Tolerances presently established in this act shall apply until the new tolerances have been duly promulgated by regulation.

Deficiencies in any other ingredient, except those covered under this section, which the registrant is required to or may guarantee shall be evaluated by the secretary and a penalty of ten times the value of the deficiency shall be assessed by the secretary; provided, however, that such penalty shall not exceed the price paid by the purchaser.

(b) All penalties assessed under this section shall be paid to the purchaser of the lot of fertilizer represented by the sample analyzed within three months after the date of notice from the secretary to the registrant and receipts evidencing payment shall be promptly forwarded to the secretary by the registrant. If said purchaser cannot be found, the amount of the penalty shall be paid to the State Treasurer who shall deposit the same into the General Fund to be credited to the general government operations appropriation of the Department of Agriculture for the payment of the cost of inspection, sampling, and analysis, and other expenses necessary for the administration of this act. As amended 1971, Aug. 12, P.L. 334, No. 85, §4; 1972, Sept. 22, P.L. 882, No. 203, §1, imd. effective; 1977, Dec. 1, P.L. 258, No. 86, §8, effective in 60 days."

3 P.S. §68.8 Commercial value

"For the purpose of determining the commercial values to be applied under the provisions of section 7,[1] the secretary shall determine and publish, annually, the values per pound of nitrogen, phosphoric acid, and potash in fertilizer in this Commonwealth. The values so determined and published shall be used in determining and assessing penalties. As amended 1977, Dec. 1, P.L. 258, No. 86, §9, effective in 60 days."

1. Section 68.7 of this title.

Full Text of Relevant Statutes and Regulations

7 Pa. Code §73.7. Percentage.

"The term 'percentages,' by symbol or word if used on a fertilizer label, shall be deemed to represent only the amount of individual plant nutrients or other factors in relation to the total product by weight."

7 Pa. Code §73.8 Investigational allowances or tolerances.

"(a) A commercial fertilizer shall be deemed deficient if the analysis of any nutrient is below the guarantee by an amount exceeding the values in the following schedule:

Guarantee percent	*Nitrogen percent*	*Available phosphoric acid percent*	*Potash percent*
4 or less	0.49	0.67	0.41
5	0.51	0.67	0.43
6	0.52	0.67	0.47
7	0.54	0.68	0.53
8	0.55	0.68	0.60
9	0.57	0.68	0.65
10	0.58	0.69	0.70
12	0.61	0.69	0.79
14	0.63	0.70	0.87
16	0.67	0.70	0.94
18	0.70	0.71	1.01
20	0.73	0.72	1.08
22	0.75	0.72	1.15
24	0.78	0.73	1.21
26	0.81	0.73	1.27

28	0.83	0.74	1.33
30	0.86	0.75	1.39
32 or more	0.88	0.76	1.44

(b) For guarantees not listed in the table set forth in subsection (a) of this section, the appropriate value shall be calculated by interpolation.

(c) For the investigational allowances listed in subsection (a) of this section to be applicable, the Association of Official Analytical Chemists procedures for obtaining samples, sample preparation, and analysis shall be used. The procedures are described in "Methods of Analysis," published by the Association of Official Analytical Chemists.

(d) The sampling equipment and procedures shall be those adopted by the Association of Official Analytical Chemists wherever applicable.

(e) The practice of averaging at least two values shall be adhered to. If more than two values are obtained, all significant values shall be averaged. Values carried to two decimals shall be used in applying averages to this table. Values shall be rounded to one place in reporting.

(f) Secondary and micronutrient elements shall be deemed deficient if any element is below the guarantee by an amount exceeding the values in the following table:

Element	*Allowable Deficiency*
Calcium	0.2 unit + 5.0% of guarantee
Magnesium	0.2 unit + 5.0% of guarantee
Sulfur	0.2 unit + 5.0% of guarantee
Boron	0.003 unit + 15% of guarantee
Cobalt	0.0001 unit + 30% of guarantee
Molybdenum	0.0001 unit + 30% of guarantee
Chlorine	0.005 unit + 10% of guarantee
Copper	0.005 unit + 10% of guarantee
Iron	0.005 unit + 10% of guarantee
Manganese	0.005 unit + 10% of guarantee
Sodium	0.005 unit + 10% of guarantee
Zinc	0.005 unit + 10% of guarantee

(g) The maximum allowance when calculated in accordance with subsection (f) of this section shall be one unit, 1.0%.

Source

The provisions of this §73.8 amended February 9, 1979, 9 Pa.B. 498. Immediately preceding text appears at serial pages (6734) and (6735).

NOTICE OF APPEAL

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 397, 398 C.D. 1980

S.H. GOSS, INC. and CENTRAL CHEMICAL CORPORATION,

Petitioners

vs.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF AGRICULTURE,

Respondent

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that S.H. Goss, Inc. and Central Chemical Corporation, the petitioners above named, hereby appeal to the Supreme Court of the United States from the final order affirming the imposition of civil penalties upon the petitioners, entered herein on April 15, 1981. Petitioners' Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on September 14, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

s/ Lewis H. Markowitz
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